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No. 09-1486

Supreme Court, U.S.
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In the Supreme Court of the United States

TAMARA J. FISHER, et al.,
Petitioners,

v.

McCRARY CRESCENT CITY, et al.,
Respondents.

On Petition for Writ of Certiorari to the Court of Special Appeals of Maryland

PETITIONERS' REPLY BRIEF

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November 3, 2010

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RULE 29.6 STATEMENT

Petitioner's corporate disclosure statement was set forth at page ii of their petition for a writ of certiorari, and there are no amendments to that statement.

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ARGUMENTS

I
INTRODUCTION

Nothing contained in the Respondents opposition undermines the importance of the issues that arise in this case under the Due Process Clause of the Fourteenth Amendment. Courts around the country are deeply divided and in deep conflict over the validity and scope of the "conspiracy" theory of jurisdiction.

A resolution of the issues presented in the petition is compelling because the actions of the Maryland courts in this case are in direct conflict with a long line of precedent from this Court. Maryland's exercise of personal jurisdiction over a non-resident defendant in a suit brought by non-resident plaintiffs is without peer. This case is a poignant example of the confused state, of the lower courts, over the due process constraints on a forum's ability to exercise jurisdiction.

In an attempt to avoid review of a constitutionally infirm theory, Respondents ignore facts, arguments and long standing due process principles, while twisting logic and the law beyond recognition[1]. The

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[1] Respondents' suggest that that jurisdiction over Petitioners comports with Maryland's Long Arm Statute by quoting the phrase: "Causes tortious injury in the State or outside of the State by an act or omission outside the State." (See Opposition at 25). This partial quote is misleading. The section referred to provides:

> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State *if he*

long litany allegations contained in the "statement of the case" involve actors and issues not before this Court and allegations of conspiracy based on nothing more substantial than "information and belief." Astounding as it may seem, the "statement" completely ignores the simple fact that at the time the lawsuit in this case was filed, the only party to this case that was domiciled in Maryland was a codefendant.

Petitioners will not quibble with the inaccuracies contained in the Respondents' statement of the case. Rather they will stand by their own statement of the case and the record below. After all "[i]t is the record, not the parties' view of it, that must control [this Court's] decision." *Kansas v. Hendricks*, 521 U.S. 346, 392 (1997)

II
The Widespread Confusion and Conflict in the Lower Courts, Over The Validity and Scope of the "Conspiracy" Theory of Jurisdiction Justifies Review.

This is not a case where there is simply an isolated conflict between a state court and a federal district court as Respondents suggest. Rather it is the

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regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State

(Emphasis added). MD. CODE, CTS. & JUD. PROC. § 6-103(b)(4). 89a. Obvious this section does not apply because Petitioners don't do business in Maryland.

widespread importance of the question and the various and diverse judicial positions taken with respect to the conspiracy theory that required this court to speak to the issue.

On occasion this Court has granted certiorari "to forestall a possible conflict in the lower courts" on an important issue, even though there was no direct conflict among various district court and court of appeals opinions, *Dawson Chem. Co. v. Rohm & Hass Co.*, 448 U.S. 176, 185 n.4 (1980). Or, as in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 460 (1981) where one state supreme court took a position contrary to seven state courts and one court of appeals this Court granted certiorari because of the "growing number of conflicting federal and state decisions" on the issue. *Id* at 446 n.9.

An example of the conflicts that exist and the confusion the lower counts are experiencing with the theory can be found in Illinois. In fact, the position taken in Illinois has changed dramatically over the past twelve years. The initial position was that Illinois' long-arm statute "encompasses the conspiracy theory of jurisdiction." *Cameron v. Owens-Corning Fiberglas Corp.* ., 296 Ill.App.3d 978, 986, 231 Ill.Dec. 55, 695 N.E.2d 572, 577 (1998). Later the theory was limited in *Ploense v. Electrolux Home Products, Inc.*, 377 Ill.App.3d 1091, 1105-06, 317 Ill.Dec. 773, 882 N.E.2d 653, 665-67 (2007). In that case, the court declined to exercise personal jurisdiction because the plaintiff did not allege any activity that the defendant purposely directed at Illinois. *Id*.

In so ruling, the *Ploense* Court traced the development of the conspiracy theory in Illinois.

Noting that initially, the theory was grounded in the idea that one conspirator's actions in the forum state could be imputed to fellow conspirators because each acts as an agent of the others. *Id.* 317 Ill.Dec. 773, 882 N.E.2d at 666. The Court went on to suggest that when the Illinois Supreme Court later held, that no agency relationship exists among conspirators, it had the effect of "scuttling the [conspiracy] 'theory of jurisdiction.' " *Id.* (citing *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill.2d 12, 24, 230 Ill.Dec. 596, 694 N.E.2d 565, 571 (1998)).

Later a different intermediate appellate court in Illinois rejected "the argument that the conspiracy theory somehow undermines the individualized analysis required by due process." *Knaus v. Guidry*, 389 Ill.App.3d 804, 822, 906 N.E.2d 644, 659 (2009). Ultimately the *Knaus* Court declined to exercise personal jurisdiction because the "defendants' conspiracy was to secure the money of plaintiffs, who were residents of Florida and Missouri, through fraud." 389 Ill.App.3d at 827, 906 N.E.2d at 663.

The *Knaus* Court went on to lament the lack of this Court's guidance:

> While there do not appear to be any United States Supreme Court decisions dealing with the conspiracy theory of jurisdiction, under which an out-of-state coconspirator can be subjected to in personam jurisdiction predicated upon the vicarious acts of a coconspirator...

389 Ill.App.3d at 826, 906 N.E.2d at 662. Other courts have made the same cry for a contemporary jurisdictional road map:

> To our knowledge, the United States Supreme Court, as yet, has not definitively examined the conspiracy theory of jurisdiction. *We must therefore attempt to formulate a workable standard*, recognizing that evolution will inevitably call for refinement.

(Emphasis added). *Istituto Bancario Italiano SpA v. Hunter Engineering Co.*, 449 A.2d 210, 225 (Del.1982)

So far at least forty-three (43) jurisdictions[2] have addressed the validity or scope of the conspiracy theory of jurisdiction. This disagreement involves federal courts in Alabama, Colorado, the District of Columbia, Illinois, Iowa, Kansas, Michigan, Maryland, Pennsylvania, New York, North Carolina and Vermont that have embraced the theory. While federal courts in Arizona, California, Maine, Minnesota, Ohio, Oregon, Texas, and Wisconsin have rejected the theory on due process grounds. These courts have adopted differing or, like the case of Illinois, ever evolving jurisdictional rules. Clearly the reoccurring nature and diverse approaches to this jurisdictional theory supports a grant of certiorari, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 n. 14 (1981) In *City of Newport* this Court granted certiorari finding that a disagreement between just four federal district courts constituted a recurring and important issue. Here at least 20 federal courts have adopted diverse approaches.

This Court has also granted certiorari "because of the discordant views in the circuits regarding the

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[2] Citations in opening petition for certiorari omitted.

proper application" of its prior decisions *United States v. Gaddis*, 424 U.S. 544, 547 (1976). Clearly, courts considering the conspiracy theory have been ignoring the "Effects Test" the Court enunciated in *Calder v. Jones,* 465 U.S. 783, 788 n.8 (1984) and this Court's repeated admonition that in a "minimum contacts" analysis "it is the contacts of the defendant himself that are determinative" *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

This case is also important because of the divergent views expressed by the courts that have adopted the conspiracy theory of jurisdiction. Formulations range from a minimal showing of a conspiracy for the exercise of jurisdiction, *Maricopa County v. American Petrofina, Inc.*, 322 F.Supp. 467 (N.D.Cal. 1971), ("A conspiracy, no matter where made, creates a destructive force which extends into the state." *Id* at 469): to complex formulations that require the plaintiff to:

> make a factual showing that: (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.

Istituto Bancario Italiano SpA, 449 A.2d at 225.

On the outside edge of these divergent views is the opinion of the Court of Special Appeals in the case *sub judice*. Instead of basing jurisdiction on the location of the harm or where the effects were felt, the lower court based jurisdiction on the notion that Petitioners' knew "that the conspiracy involved actors with ties to Maryland", *Fisher v. McCrary Crescent City, LLC*, 186 Md.App. 86, 112, 972 A.2d 954, 969-70 (2009). It reached this result, notwithstanding the fact that the plaintiff did not reside in the jurisdiction at the time the torts occurred.

The instant case presents the Court with an illustration of just how extreme the various formulations of the conspiracy theory of jurisdiction can be. It also points out the lower courts need for guidance as too if and/or how the theory can be constitutionally applied. As a practical matter if the ruling of the Court of Special Appeals is left to stand it would encourage plaintiffs to move into a "plaintiff friendly" jurisdiction for the sole purpose of litigation.

III
The Petition for Certiorari was Timely

On January 8, 2010, pursuant to Maryland Rule 8-605, 5c, the Petitioners filed a motion for reconsideration of the Court of Appeals' denial of their petition for certiorari. On March 12, 2010, "after having considered" the petition the Court of Appeals of Maryland denied it. 81a. At that point Petitioner's last avenue of obtaining discretionary review in the Courts of Maryland, was lost. The Petitioners filed their petition for certiorari in this Court on June 1, 2010 well within the 90 days required by Supreme Court Rule 13.3.

In an effort to avoid review in this Court, the Respondents contend that Maryland Rule 8-605 is not designed to address a denial of petition for certiorari. Contrary to the protestation of the Respondents, Maryland Rule 8-605, clearly envisions discretionary reconsideration of a denial of certiorari[3]. Although these motions are rarely granted, on occasion they are. Just two weeks ago the Court of Appeals pointed out that it had done just that:

> "[t]his Court initially denied the certiorari petition, but, on motion for reconsideration, the Court on August 22, 2007, granted the petition and issued a writ of certiorari in the three home improvement cases.

Stachowski v. State, --- Md. ---, --- A.3d ----, 2010 WL 4140277, at *2, 2010 Md. LEXIS 622, at *5 (2010); see also *Jones v. Peninsula*, 394 Md. 308; 905 A.2d 843, *cert. denied*, 395 Md. 423, 910 A.2d 1063, *cert. granted on reconsideration*, 395 Md. 562, 910 A.2d 1145 (2006).

Hoping to capitalize on the fact that the Maryland Rules use the term "motion for reconsideration" instead of "petition for rehearing," Respondents argued a motion for reconsideration was not a petition for rehearing within the meaning of Supreme Court Rule 13.3. (Opposition at 13). Semantically this is a distinction without a difference. *Missouri v. Jenkins*, 495 U.S. 33 (1990) (Misnomer petition for rehearing in banc treated as petition for rehearing). Clearly a

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[3] Indeed the Court of Appeals of Maryland denied five other motions for reconsideration along with Petitioners. http://www.courts.state.md.us/coappeals/grants/03_10grants.html.

motion for reconsideration is the equivalent of a petition for rehearing. *United States v. Ohio Power Co.*, 353 U.S. 98, 108 n. 18 (1957), (They include "...motions and petitions for reconsideration..." *Id.*). A motion for reconsideration like a "petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked" *Missouri v. Jenkins*, 495 U.S. at 47 n. 14. Here the Petitioner's motion for reconsideration did precisely that.

The important consideration is not in the name of the pleading. Rather it is when the decision below becomes final under the practice in the state where the litigation is pending. That date in this case was March 12, 2010, when the Court of Appeals issued its order denying reconsideration. As this Court has pointed out:

> whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the state court of last resort through the medium of a petition for rehearing, and such a petition is presented to and entertained and considered by that court, *we must take it that by the practice prevailing in the state the litigation is not brought to a conclusion until this petition is disposed of*, and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the act of Congress.

(Emphasis added), *Chicago Great Western R. Co. v. Basham,* 249 U.S. 164, 167 (1919).

Under Maryland law the March 12, 2010 Order of the Court of Appeals denying the motion for

reconsideration constituted a final judgment from which a petition for certiorari may be taken. Specifically § 12-101(f) of the Courts Article provides:

> (f) "Final judgment" means a judgment, decree, sentence, *order*, determination, decision, or other action by a court, including an orphans' court, from which an appeal, application for leave to appeal, or *petition for certiorari may be taken*.

MD Code, Courts and Judicial Proceedings § 12-101(f). (Emphasis supplied). Because the denial, of their petition for certiorari on December 11, 2009 was subject to being reconsidered and granted on Petitioners motion for reconsideration (as was done in *Stachowski, supra* and *Jones, supra),* the decision below was not final until March 12, 2010.

IV
The issues were raised and preserved below

After being served with the Amended Complaint, Tamara J. Fisher and Market Street Properties LLC (Market Street) moved, pursuant to Maryland Rule 2-322(a)(1), 1c, to dismiss the Amended Complaint based on a lack of personal jurisdiction. The motion specifically stated that: "Plaintiffs' complaint falls short of the requisite factual allegations necessary to satisfy the 'reasonable expectation' standard set forth in the Due Process Clause of the Fourteenth Amendment." Respondents replied to that motion by urging the trial court to establish jurisdiction by adopting the "willful blindness" theory of liability used in conspiracy cases. Trial Judge discussed and

apparently adopted theories of willful blindness, and constructive knowledge. 73a.

In September of 2005, TJ Biscayne Holdings LLC (TJ Biscayne) was administratively dissolved. No motion was filed on behalf because it no longer existed. As a result (and as pointed out in the Amended Complaint) Ms. Fisher stands in its shoes and is ultimately liable for any judgment entered against it. Because she is the real party in interest any defense she raises in her own defense must relate back to the defunct LLC.

Had counsel for TJ Biscayne not been precluded from participating at the hearing on damages he could have raised and argued[4] a want of jurisdiction, pursuant to Maryland Rule 2-613(f)(1), 4c, at the hearing on damages. Rule 2-613(f) provides:

> (f) Entry of Judgment. If a motion was not filed under section (d) of this Rule or was filed and denied, the court, upon request, may enter a judgment by default that includes a determination as to liability and all relief sought, *if it is satisfied (1) that it has jurisdiction to enter the judgment* ...

Rule 2-613(f)(emphasis supplied). Because of this defect in the proceeding TJ Biscayne should not be deemed to have waived the issue of jurisdiction. Assuming arguendo that TJ Biscayne somehow failed

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[4] Counsel could also have argued in opposition to the motion for summary judgment mentioned on page 14 of Petitioners opposition.

to raise the issue below, it has no effect on the remaining Petitioners.

Finally, the Respondents' reliance on *Cooper v. Roche*, 36 Md. 563, 565 (1872), is misplaced. First the argument was waived because Respondents' did not raise it below. Second, *Cooper* dealt with subject matter jurisdiction not personal jurisdiction. Third, as pointed out *supra,* Maryland Rule 2-613(f) requires the court to be "satisfied" "that it has jurisdiction to enter the judgment." And, finally Maryland Rule 8-131(a) specifically provides for non-waiver where a preliminary motion contesting jurisdiction is filed pursuant to Maryland Rule 2-322(a)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

RULE 2-322. PRELIMINARY MOTIONS

(a) Mandatory. The following defenses shall be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the person, (2) improper venue, (3) insufficiency of process, and (4) insufficiency of service of process. If not so made and the answer is filed, these defenses are waived.

(b) Permissive. The following defenses may be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the subject matter, (2) failure to state a claim upon which relief can be granted, (3) failure to join a party under Rule 2-211, (4) discharge in bankruptcy, and (5) governmental immunity. If not so made, these defenses and objections may be made in the answer, or in any other appropriate manner after answer is filed.

(c) Disposition. A motion under sections (a) and (b) of this Rule shall be determined before trial, except that a court may defer the determination of the defense of failure to state a claim upon which relief can be granted until the trial. In disposing of the motion, the court may dismiss the action or grant such lesser or different relief as may be appropriate. If the court orders dismissal, an amended complaint may be filed only if the court expressly grants leave to amend. The amended complaint shall be filed within 30 days after entry of the order or within such other time as the

court may fix. If leave to amend is granted and the plaintiff fails to file an amended complaint within the time prescribed, the court, on motion, may enter an order dismissing the action. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

(d) Motion for More Definite Statement. If a pleading to which an answer is permitted is so vague or ambiguous that a party cannot reasonably frame an answer, the party may move for a more definite statement before answering. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 15 days after entry of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(e) Motion to Strike. On motion made by a party before responding to a pleading or, if no responsive pleading is required by these rules, on motion made by a party within 15 days after the service of the pleading or on the court's own initiative at any time, the court may order any insufficient defense or any improper, immaterial, impertinent, or scandalous matter stricken from any pleading or may order any pleading that is late or otherwise not in compliance with these rules stricken in its entirety.

(f) Consolidation of Defenses in Motion. A party who makes a motion under this Rule may join with it any other motions then available to the party. No defense or objection raised pursuant to this Rule is waived by being joined with one or more other such defenses or objections in a motion under this Rule. If a party makes a motion under this Rule but omits any defense or objection then available to the party that this Rule permits to be raised by motion, the party shall not thereafter make a motion based on the defenses or objections so omitted except as provided in Rule 2-324.

RULE 2-613. DEFAULT JUDGMENT

(a) Parties to Whom Applicable. In this Rule, the term "plaintiff" includes counter-plaintiffs, cross-plaintiffs, and third-party plaintiffs, and the term "defendant" includes counter-defendants, cross-defendants, and third-party defendants.

(b) Order of Default. If the time for pleading has expired and a defendant has failed to plead as provided by these rules, the court, on written request of the plaintiff, shall enter an order of default. The request shall state the last known address of the defendant.

(c) Notice. Promptly upon entry of an order of default, the clerk shall issue a notice informing the defendant that the order of default has been entered and that the defendant may move to vacate the order within 30 days after its entry. The notice shall be mailed to the defendant at the address stated in the request and to the defendant's attorney of record, if any. The court may provide for additional notice to the defendant.

(d) Motion by Defendant. The defendant may move to vacate the order of default within 30 days after its entry. The motion shall state the reasons for the failure to plead and the legal and factual basis for the defense to the claim.

(e) Disposition of Motion. If the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead, the court shall vacate the order.

(f) Entry of Judgment. If a motion was not filed under section (d) of this Rule or was filed and denied, the court, upon request, may enter a judgment by default that includes a determination as to liability and all relief sought, if it is satisfied (1) that it has jurisdiction to enter the judgment and (2) that the notice required by section (c) of this Rule was mailed. If, in order to enable the court to enter judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings, or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury.

(g) Finality. A default judgment entered in compliance with this Rule is not subject to the revisory power under Rule 2-535(a) except as to the relief granted.

MD RULE 8-131 SCOPE OF REVIEW

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) In Court of Appeals--Additional Limitations.

(1) Prior Appellate Decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

RULE 8-605. RECONSIDERATION

(a) Motion; Response; No Oral Argument. Except as otherwise provided in Rule 8-602(c), a party may file pursuant to this Rule a motion for reconsideration

of a decision by the Court that disposes of the appeal. The motion shall be filed (1) before issuance of the mandate or (2) within 30 days after the filing of the opinion of the Court, whichever is earlier. A response to a motion for reconsideration may not be filed unless requested on behalf of the Court by at least one judge who concurred in the opinion or order. Except to make changes in the opinion that do not change the decision in the case, the Court ordinarily will not grant a motion for reconsideration unless it has requested a response. There shall be no oral argument on the motion.

(b) Length. A motion or response filed pursuant to this Rule shall not exceed 15 pages.

(c) Copies--Filing.

(1) *In Court of Special Appeals.* In the Court of Special Appeals, the original of the motion and any response shall be filed together with four copies if the opinion of the Court was unreported or 13 copies if reported.

(2) *In Court of Appeals.* In the Court of Appeals, the original and seven copies of the motion and any response shall be filed.

(d) Mandate to Be Delayed. A motion for reconsideration shall delay issuance of a mandate, unless otherwise ordered by the Court.

(e) Disposition of Motion. A motion for reconsideration shall be granted only with the consent of at least half the judges who concurred in the opinion. If a motion for reconsideration is granted, the Court may make a final disposition of the appeal

without reargument, restore the appeal to the calendar for argument, or make other orders, including modification or clarification of its opinion, as the Court finds appropriate.